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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Ancillary or Supplementary Use of
Digital Television Capacity by Noncommercial
Licensees

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MM Docket No. 98-203

TO: The Commission

**COMMENTS OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

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SUMMARY

Under section 336 of the Communications Act, the Commission is required to adopt rules permitting digital television licensees to "offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." The Commission should provide public television stations with substantial flexibility in the use of their excess digital spectrum to provide ancillary or supplementary services, so long as the digital channel is used primarily to provide a noncommercial educational service and the ancillary or supplementary services do not interfere with the provision of public telecommunications services. These requirements are consistent with those the Commission has applied in the analog environment, and they provide sufficient flexibility for public television stations to use excess digital spectrum to generate much needed revenue. The Commission should make explicit that the requirements will apply in the digital environment.

Allowing public television stations to offer ancillary or supplementary services for remuneration is clearly in the public interest because it will provide stations with additional revenue to support their mission-related activities. Public television stations have limited revenue sources and are under significant financial pressure, particularly as they confront the heavy financial burdens of converting their facilities to digital technology and operating dual analog and digital services. Revenue earned from ancillary or supplementary services will help public television stations to defray the expenses of the digital transition and fund their digital operations thereafter. Moreover, allowing public television stations to offer ancillary or supplementary services will

advance the interests identified by the Commission in its *Fifth Report and Order* – promoting innovation and spectrum efficiency and speeding the digital transition.

In view of the proposed restrictions and other limitations on the range of activities in which public television stations can engage, discussed herein, there is no need for the Commission to impose special restrictions on these stations' provision of ancillary or supplementary services. If problems should surface as stations develop their digital services, the Commission can address them in a concrete context at that time.

The Commission should exempt public television licensees from any obligation to pay fees in connection with offering ancillary or supplementary services when revenues from these services are used to support a station's mission-related activities. Such an exemption would be consistent with the terms of Section 336 and with other congressional and regulatory policies.

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The Association of America's Public Television Stations ("APTS") submits these comments in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in this proceeding, issued November 23, 1998. APTS is a nonprofit membership organization whose members are licensees of virtually all of the nation's public television stations. APTS serves as the direct national representative of these stations, presenting their views and participating in proceedings before Congress and executive and administrative agencies, and in other venues. These comments reflect a consensus industry recommendation that has been approved by the APTS Board of Trustees.

I. INTRODUCTION

This proceeding arises out of Section 336 of the Communications Act, which requires the Commission to adopt rules permitting digital television licensees to "offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity."¹ In its *Fifth Report and Order* in MM Docket No. 87-268, the Commission adopted rules permitting digital television licensees flexibility to use their digital capacity to provide ancillary or supplementary services, so long as such services do not derogate the free, over-the-air program service the Commission has required licensees to provide.²

In issuing rules on ancillary or supplementary services, the Commission did not distinguish between commercial and noncommercial licensees. Nevertheless, the Commission has opened this separate proceeding to address the ancillary or supplementary use of digital television capacity by noncommercial licensees.³ The

¹ 47 U.S.C. § 336(a). Section 336 was added by the Telecommunications Act of 1996.

² *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, MM Docket No. 87-268, 12 FCC Rcd 12808 (1997) ("*Fifth Report and Order*"), at ¶¶ 19-36. In its *Fifth Report and Order*, the Commission required only that each digital licensee "transmit at least one over-the-air video program signal at no direct charge to viewers" on its digital channel. 47 CFR § 73.624(b).

³ Following issuance of the *Fifth Report and Order*, APTS and the Public Broadcasting Service ("PBS") petitioned for clarification that noncommercial television stations are authorized to offer ancillary or supplementary services for remuneration. The Commission deferred consideration of that request to this proceeding.

Commission also seeks comments on whether noncommercial television stations should be exempted from paying fees on revenues they receive from ancillary or supplementary services.⁴

As explained below, it is clearly in the public interest to allow public television stations to use their excess digital spectrum to earn revenue from ancillary or supplementary services subject to two constraints. The Commission should require, first, that public television stations be used primarily to provide a noncommercial educational service; and second, that the offering of ancillary or supplementary services not interfere with a station's provision of public telecommunications services. This is consistent with the requirements the Commission has applied in the analog environment and also provides stations with substantial flexibility to offer ancillary or supplementary services that will generate revenue to support the stations' mission-related activities.

In view of these and other existing limitations, there is no need for the Commission to impose further restrictions on the provision of ancillary or supplementary services by public television stations. The Commission should take steps to exempt public television licensees from fees on revenues from ancillary or supplementary services that are used to support the stations' mission-related activities.

⁴ The Commission previously sought comments, in MM Docket No. 97-247, on the fees issue, including the question whether there should be a fee exemption for revenue earned by public television stations from ancillary or supplementary services. The Commission issued an order governing fees to be paid by commercial television licensees, but deferred to this proceeding the question of fees for noncommercial licensees. *In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996*, Report and Order, MM Docket No. 97-247 (rel. Nov. 19, 1998), at ¶ 43.

II. PUBLIC TELEVISION'S DIGITAL PLANS

A. Public Television's Leadership in Digital Technology

For over 30 years, public television has been an active participant in the development and use of innovative technologies to serve the goals of education and public service. Using the most current technology, public television ensures that viewers of all ages and abilities, from every socioeconomic level and geographic location, have access to the highest quality noncommercial educational and cultural programming. Public broadcasters employ a combination of technologies, including broadcast, satellite networks, DBS, cable, datacasting, closed captioning, interactive video discs, and the Internet, to educate millions of children and adults at home, in classrooms, in daycare centers, and at work.

This tradition of leadership continues in the development of digital technology. Among other things, public television has played an active role in developing the digital transmission standard and in testing various forms of digital technology.⁵ Indeed, the world's first digital HDTV broadcast was from WETA to Capitol

⁵ See Notice ¶ 21. Public broadcasters played an active role in developing the transmission system for digital advanced television known as the "Grand Alliance" system, and served on the Commission's Advisory Committee on Advanced Television Service, whose recommendations gave rise to the adoption of the "ATSC Standard." In addition, PBS was one of the founding members of the Advanced Television Test Center, which conducted laboratory tests of the Grand Alliance System. PBS also conducted field tests of the Grand Alliance system in Charlotte, North Carolina. WMVT, the public television station in Milwaukee, was the first broadcaster to provide an HDTV satellite test signal. And KCTS in Seattle was the first public broadcaster to begin transmitting digital signals using the ATSC standard, and was the first station in the United States to produce HDTV programming.

Hill in March 1992. And several major market public television stations have already initiated service on their new digital channels.

B. Public Television's Plans for Use of Digital Technology to Further Its Educational and Public Service Mission

Each public television licensee has been allocated a digital channel.

Individual licensees will make their own choices about how to use the new digital spectrum. But all public television licensees will use the spectrum primarily to further public television's educational and public service mission.

As the Commission recognizes, digital technology will allow public television to enhance its services very significantly.⁶ With high definition television, public television's signature programs, including programs focused on the performing arts, nature, and travel, will be vastly improved. In addition, digital technology will allow multicasting of standard definition programming, allowing public television to bring significantly more public service educational programming to new audiences. For example, on a single digital channel a public television station could carry, in addition to its current programming, a dedicated children's channel, an adult lifelong learning

⁶ See Notice ¶ 21. Public broadcasting expects to focus particular attention on using digital technology in connection with (1) early childhood services (including expansion of the Ready to Learn service); (2) technology integration in K-12 education (with the goal of making enhanced K-12 services available to all schools); (3) workforce education and training (with the goal of increasing the reach of post-secondary telecourses and workplace training so that they will be available to all adult learners and workers); and (4) accessibility to digital services by unserved and underserved audiences (particularly physically challenged and non-English speaking people). A summary of public broadcasting's digital transition plans, as presented to the Office of Management and Budget, is included as Attachment 1 to these comments.

channel, and a local programming channel.⁷ Multicasting will also permit public television to provide a more comprehensive Ready to Learn service to children, parents and caregivers⁸ and will allow more stations to provide K-12 services to more elementary and secondary students throughout the country.

Digital technology also will enable public television to expand the way in which it communicates with audiences. Digital capability will help public television stations improve their traditional services to the physically challenged, including closed captioning and descriptive video. In addition, among other things, public television intends to use digital capability to integrate video-based programs with data and images that will create entirely new, extremely powerful educational applications for services from preschool programs, to distance learning, to public television's signature programming.⁹

⁷ A high percentage of public television stations plan to use multicasting to expand their program offerings. Attachment 2 to these comments shows sample digital schedules for Maryland Public Television and Oregon Public Television. These schedules demonstrate how multicasting will allow public television stations to expand their daytime educational and public service programming by adding a children's Ready to Learn channel, a local public affairs channel, an adult education channel, and other specialized services.

⁸ Although many public television stations can offer the basic video portion of the Ready to Learn service, some stations are unable to offer a full range of Ready to Learn programs due to limited channel capacity and the commitment to meet other educational needs of their viewers. Multicasting will make it possible for stations to carry the full complement of Ready to Learn programming.

⁹ Public television currently carries "Parent Tips" on the VBI of children's shows, such as *Barney*, *Mister Rogers*, *Sesame Street* and *Reading Rainbow*. These tips help parents reinforce the lessons taught during the program. In the digital environment, (continued...)

The ability to transmit data through digital technology will provide public television with a powerful instructional tool. For example, public television stations could transmit course-related materials, such as lesson plans and teacher and student guides, as part of their instructional programming.¹⁰ The distance learning courses in advanced subjects, now offered to high school and university students via public television in several states, could be significantly improved by providing similar types of instructional data along with the programming.

Further, public television stations are exploring the possibility of delivering selected portions of the Internet directly to a viewer's television set or computer without the need for a telephone connection or access provider.¹¹ This service could include websites related to public television programming, such as NOVA, FRONTLINE, *Nature*, *Arthur*, *The Living Edens*, and *The Democracy Project*, or other related Internet content. This information would be an additional source of educational material that

public television will be able to enhance and expand these types of educational services.

¹⁰ In the digital environment, stations will be able to offer instructional materials before, during, or after the transmission of their Ready to Learn programs. Currently, students, parents and teachers must obtain a hard copy of such materials separately. The ability to transmit materials with the broadcast signal undoubtedly will make the instructional materials more readily available and thereby more useful for children and parents using the Ready to Learn service. In addition, public television could adapt and extend PBS Mathline and Scienceline, year-long professional development services that use video and online techniques to help teachers improve their instructional practices based on national educational standards.

¹¹ Some public television stations are already providing the PBS Kids! website on the vertical blanking interval ("VBI") of their analog broadcast channel.

could benefit students and the general public. Moreover, by using their local public television station as a gateway, parents could ensure that their children have a wholesome experience when they use the Internet.

C. Public Television's Provision of Ancillary or Supplementary Services

While all public television licensees will use their digital spectrum primarily for services related to public television's educational and public service mission, some stations hope to use a portion of their digital capacity to offer revenue-generating services as a means of supporting their mission-related activities. This is similar to the practice by which some public television stations lease excess capacity on the vertical blanking interval ("VBI") and subcarriers of their analog broadcast channel.¹² The revenues generated through leasing of this excess VBI and subcarrier capacity are used to defray costs associated with public television's mission-related activities.

The new digital channels will provide public television stations with similar opportunities to offer services that would generate revenues to help fund mission-related activities. To the extent a public television station has excess digital capacity – *i.e.*, capacity that it does not need for its basic broadcast service and other mission-

¹² National Datacast, Inc. ("Datacast"), a for-profit subsidiary of PBS, manages nationwide commercial data distribution and broadcasting services utilizing public television stations' VBI. See separate comments filed by National Datacast for a description of services offered.

related purposes – it could use that excess capacity to provide ancillary or supplementary services for remuneration.¹³

At this point, public television stations do not have firm plans for the use of their excess digital spectrum, and it is impossible to predict what opportunities may be available to them. Nor can APTS predict for certain how many stations will take advantage of various opportunities that may materialize. Some stations may choose to offer ancillary or supplementary services only to a minimal extent, or not at all.¹⁴ Others may conclude that they need this additional source of revenue in order to fund their digital conversion costs or to cover the expenses of digital operation and services. In any case, there is no question that any ancillary or supplementary services offered by public television stations will be subsidiary to their noncommercial mission-related activities.

¹³ Possibilities might include data services (e.g., services providing stock quotations or sports scores), leasing of excess capacity to a third party (e.g., a public school or a paging service), or joint ventures between a station and a third party (e.g., to offer subscription video services).

As explained in the comments of APTS, PBS, and CPB in CS Docket No. 98-120, a mission-related service is not "ancillary or supplementary" simply because a public television station may receive some compensation in connection with that service. For example, in exchange for including a particular telecourse as part of its programming, a public television station might receive payments from a local university to cover the cost of that program. Or, if a public television station provided one of its standard definition channels to carry a C-SPAN service that cable operators had dropped, the station presumably would receive compensation for its costs from C-SPAN. These sorts of mission-related services should be regarded as part of the station's basic broadcast service, not as "ancillary or supplementary."

¹⁴ According to a recent survey by APTS, nearly 30 percent of public television licensees do not intend to use any of their digital capacity for non-mission-related services.

III. ALLOWING PUBLIC TELEVISION STATIONS TO OFFER ANCILLARY OR SUPPLEMENTARY SERVICES FOR REMUNERATION SERVES THE PUBLIC INTEREST.

Permitting public television stations to earn revenue from ancillary or supplementary uses of their excess digital spectrum is "consistent with the public interest, convenience, and necessity."¹⁵ In particular, the ability to receive such revenues will allow public television stations to support their mission-related activities; this includes helping to fund the very substantial expenses of the transition to digital technology. Moreover, permitting public television stations to offer ancillary or supplementary services will yield all the benefits the Commission described in its *Fifth Report and Order*.

A. Allowing Public Television Stations to Offer Ancillary or Supplementary Services Will Expand the Revenue Sources Available to Support Public Television's Mission-Related Activities.

Permitting public television stations to offer ancillary or supplementary services that will provide them with additional revenue clearly advances the public interest. Congress has assigned public television a highly ambitious educational and public service mission. Among other things, public television stations are charged with providing high quality instructional, educational and cultural programming, serving unserved and underserved audiences, and making their services available to all citizens.¹⁶ At the same time, public television stations, as nonprofit or state or local government entities, lack access to many of the revenue sources available to

¹⁵ 47 U.S.C. § 336(a)(2).

¹⁶ See, e.g., 47 U.S.C. § 396(a).

commercial stations. Compared with their commercial counterparts, public television stations have slim budgets, and many exist close to the margin of survival.

Public television stations must rely primarily on grants from federal, state and local governments, colleges and universities, viewer contributions, foundation grants, and corporate underwriting. Budget constraints at the federal, state, and local levels of government obviously affect public television funding. In addition, Congress has placed increasing pressure on public broadcasters to make efficient use of the federal funding they receive and to supplement or replace this funding with new sources of revenue.¹⁷

The digital transition is placing particular pressure on public television. The Commission's mandate that all public television stations implement digital broadcasting by May 1, 2003, imposes a tremendous financial burden on stations. Even in the best of times, many stations struggle to cover the costs of operating a single analog channel. Now they will be required to undertake an expensive conversion to digital facilities, and also to fund the dual operation of analog and digital signals.¹⁸

¹⁷ See, e.g., *Notice* ¶ 26 n.43 (describing H.R. 4067, the Public Broadcasting Reform Act of 1998).

¹⁸ Because of their nonprofit status and grassroots funding structure, stations are constrained in their ability to finance major capital expenditures. Unlike their commercial counterparts, public stations cannot pass along their costs to their customers. They cannot take out capital loans, and many, by law, must have balanced budgets on an annual basis and may not maintain cash reserves. Given these constraints, stations cannot utilize the typical mechanisms available to commercial entities to fund a major capital expenditure.

Based on a survey of stations and analysis by PBS's technical staff, public television has estimated that the costs of transitioning public broadcasting stations to digital services (including facilities construction and dual analog and digital operations during the transition) will exceed \$1.7 billion.¹⁹ APTS estimates that almost half of public television licensees (86 out of 177) will incur transition costs that alone exceed their projected annual revenues. This shortfall ranges from \$116,000 to \$18 million.

While public television hopes that federal, state, and local governments will provide some additional financial assistance to cover digital conversion expenses, it is clear that such funds will cover only a portion of the transition costs.²⁰ In fact, APTS believes that many policymakers within Congress and the Administration are inclined to endorse federal assistance for digital transition costs only if public television stations can find other sources of income to match the federal contribution.

Public television will be creative in seeking to tap a variety of other sources of funding for digital transition costs, including state and local government grants, special viewer contribution appeals, and corporate and foundation grants. However, these sources have uncertain potential, and they plainly will not be sufficient

¹⁹ Almost all of this amount represents costs to public television stations. A small percentage covers transition costs for public radio stations.

²⁰ The Commission has recognized that public television will need assistance in connection with the digital transition. In its *Fifth Report and Order*, the Commission noted "the financial difficulties faced by noncommercial stations." Because "noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV," the Commission expressed its intent "to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television." *Fifth Report and Order* ¶ 101.

to cover the shortfall for every station.²¹ For many stations, revenue from ancillary or supplementary sources is likely to play a crucial role in funding the conversion to digital facilities, as well as the expenses of dual analog and digital operations.

Revenue from ancillary or supplementary services will continue to be important to public television after the digital transition. This revenue will help public television stations to implement their plans to use new digital capabilities to enhance their educational programming and to expand the scope of services they offer to viewers, as described above. The result will be more robust educational services. Permitting public television stations to earn revenues to help defray the expenses of the digital transition and to provide expanded services in furtherance of their educational and public service mission is plainly in the public interest.

B. Congress and the Commission Have Recognized the Importance of Providing Public Television Stations with Additional Revenue Sources.

Both Congress and the Commission have recognized that providing public television stations with additional revenue sources to support their mission-related activities is in the public interest. As the Commission recognizes in its *Notice*, Congress in 1981 expressly authorized public television stations to offer revenue-generating services. In the Public Broadcasting Amendments Act of 1981, Congress provided that, except for certain prohibited advertising activities, "each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for

²¹ See "PTV Stations Gearing Up for DTV Funding Battle in States," *Communications Daily*, Jan. 4, 1999, at 2-3 (describing the uncertainty of potential (continued...))

remuneration."²² As part of the same legislation, Congress took further steps to encourage the development of outside revenue sources for public broadcasting, including creation of a temporary commission to explore additional means of alternative financing.²³

Congress took these steps in the context of austerity measures that included a reduction in federal funding for public broadcasting. The House committee recognized that "public broadcast stations must be free to generate substantial sums of additional revenue from the pursuit of commercial activities if the nation's public broadcasting system is to survive during these times of austerity and still provide high quality programming."²⁴ One of the express purposes of the legislation was to "facilitate and encourage the efforts of public broadcasting licensees to seek and develop new sources of non-federal revenues, which will be necessary for the long term support of the system as Federal funding is reduced."²⁵

funding sources for public television's digital transition). A copy of this article is included as Attachment 3 to these comments.

²² 47 U.S.C. § 399b(b)(1). Congress also provided that CPB funds may not be used to defray any costs associated with offering of services, facilities or products by a public broadcast station and that any such offering "shall not interfere with any provision of public telecommunications services by such station." 47 U.S.C. § 399b(c).

²³ Pub. L. No. 97-35, Sec. 1232, 95 Stat. 731 (1981).

²⁴ H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 16 (1981).

²⁵ 127 Cong. Rec. 13140 (1981) (remarks of Rep. Timothy E. Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce).

The Commission has recognized repeatedly that the public interest is served by permitting public television stations to receive revenue from ancillary sources to supplement their existing revenues. In 1982, for example, it stated: "This Commission has recognized the financial dilemmas of public broadcasting, and we have undertaken actions to open up new potential sources of funds."²⁶

Following enactment of the 1981 statute, the Commission concluded in a series of proceedings that, consistent with Congress's pronouncement, public television stations should have opportunities to earn revenue from new services and uses of their facilities. For example, in April 1983, in concluding that public broadcast stations should be able to offer the excess capacity on their auxiliary broadcast facilities to others on a for-profit basis, the Commission cited the 1981 statute and noted that, "[b]y allowing profit making, we are continuing our efforts to develop a regulatory environment that permits public broadcasters to make the most efficient use of their facilities and thereby supplement their revenues in the face of dwindling federal financial support."²⁷

The following month, when it decided that public television stations should be able to offer teletext services, the Commission observed that Congress intended that public television stations "provide more of their own support" and that Congress wanted

²⁶ *Amendment of the Commission's Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees*, Notice of Proposed Rulemaking, BC Docket No. 82-441, 47 Fed. Reg. 36252, 36253 (1982).

²⁷ *In the Matter of Amendment of Part 74, Subpart F of the Commission's Rules to Permit Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations*, Report and Order ("*Broadcast Auxiliary Facilities Report and Order*"), BC Docket No. 81-794, 93 F.C.C.2d 570, 578 (1983).

to "make it easier for public stations to independently increase their revenue base."²⁸

Citing similar considerations, the Commission subsequently authorized public television stations to offer a full range of services on the subcarrier frequencies of their aural basebands,²⁹ and on the VBI of their video signals.³⁰

The Commission's record of repeatedly taking measures designed to maximize the financial resources available to public television stations provides an appropriate precedent here. Giving public television stations the opportunity to earn

²⁸ *In the Matter of Amendment of Parts 2, 73 and 74 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, Report and Order ("Teletext Report and Order"), BC Docket No. 81-741, *et al.*, 48 Fed. Reg. 27054 (1983), at ¶ 51.

²⁹ *47 C.F.R. Parts 2 and 73; The Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters*, Final Rule ("Subcarrier Frequencies Final Rule"), 49 Fed. Reg. 18100 (1984), at ¶ 16; *id.*, Proposed Rules, 48 Fed. Reg. 37475 (1983), at ¶ 15.

³⁰ *In the Matter of Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, Report and Order ("VBI Report and Order"), MM Docket No. 84-168, 101 F.C.C.2d 973, 981 (1985).

Congress and the Commission have also recognized in other contexts that the public interest is served by steps that maximize the financial support available to public television stations. For example, Congress has exempted public broadcasters from the application and regulatory fees that are paid by commercial communications entities. See 47 U.S.C. §§ 158(g), 159(g). The Commission has noted that Congress acted out of a concern that "exacting fees from noncommercial educational applicants would dilute the financial support offered by Congress." *In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, Docket No. 86-285 ("Application Fees Proceeding"), 3 FCC Rcd 5987, 5988 (1988); *In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, MM Docket 94-19 ("Regulatory Fees Proceeding"), 9 FCC Rcd 6957, 6967 (1994). See also *Application Fees Proceeding*, 51 Fed. Reg. 25792, 25798 n.57 (1986); 47 C.F.R. §§ 1.1112 (application fees), 1.1162 (regulatory fees).

revenue from use of excess digital spectrum to provide ancillary or supplementary services to support their mission-related activities is consistent with the Commission's long-standing conclusion that facilitating additional revenue sources for public television stations is in the public interest.

C. Permitting Public Television Stations to Offer Ancillary or Supplementary Services Will Provide the Benefits Described in the *Fifth Report and Order*.

In its *Fifth Report and Order*, the Commission cited various reasons in support of its conclusion that broadcasters should be given authority to offer ancillary or supplementary services on their excess digital spectrum. All of these considerations apply equally to public television stations.

For example, the Commission concluded that permitting broadcasters to offer ancillary or supplementary services would serve the public interest "by fostering the growth of innovative services to the public and by permitting the full possibilities of the DTV system to be realized."³¹ This is plainly true for public television stations. As described above, public television has been a leader in developing and using digital technology, and has devoted substantial effort to developing innovative plans for mission-related digital services.³² Public television stations that choose to offer ancillary or supplementary services are likely to bring the same fresh approach to these

³¹ *Fifth Report and Order* ¶ 33.

³² See pages 4-8, *supra*. See also, e.g., Albiniak, "HDTV: Launched and Counting," *Broadcasting & Cable*, Nov. 2, 1998, at 6, 8 (characterizing PBS as "the surprise leader in original HDTV programming").

activities, introducing perspectives different from those of commercial entities,³³ resulting in new types of uses for the digital spectrum.³⁴

The Commission also stressed that allowing ancillary or supplementary services could "contribute to efficient spectrum use and . . . expand and enhance use of existing spectrum."³⁵ Again, this consideration is fully applicable to public television. Even when public television stations reach their goals of prime time HDTV programming and a full array of multicast programs, there will be some excess capacity. It would certainly be more efficient to permit other uses of the capacity than to leave it idle.

The Commission further concluded that permitting broadcasters to offer services that consumers want will promote an expeditious transition from analog to digital television.³⁶ In view of their need for revenue, public television stations will have every incentive to identify and offer services that are desired by consumers. Such services should help to attract consumers to digital television, thereby hastening the transition.

³³ See, e.g., "WGBH Develops DTV Captioning," *Broadcasting & Cable*, Jan. 4, 1999, at 69.

³⁴ Public television stations also might be able to provide access to some services that are displaced as a result of the digital transition through leasing of capacity to, e.g., low power television stations that provide minority programming.

³⁵ *Fifth Report and Order* ¶ 32.

³⁶ *Id.* ¶ 33.

Thus, the factors cited by the Commission in its *Fifth Report and Order* support the conclusion that it is in the public interest to allow public television stations to offer ancillary or supplementary services. In view of the additional strong interest in providing public television stations with new revenue sources to support their mission-related activities, the case for permitting these stations to offer such services is even more compelling than the case for granting that authority to commercial stations.

IV. PUBLIC TELEVISION STATIONS SHOULD HAVE FLEXIBILITY IN CONNECTION WITH ANCILLARY OR SUPPLEMENTARY SERVICES SO LONG AS STATIONS ARE USED PRIMARILY TO PROVIDE A NONCOMMERCIAL EDUCATIONAL SERVICE AND THE ANCILLARY OR SUPPLEMENTARY SERVICES DO NOT INTERFERE WITH THE PROVISION OF PUBLIC TELECOMMUNICATIONS SERVICES.

A. Providing Public Television Stations with Flexibility in Connection With Ancillary or Supplementary Services Is Consistent with Congressional Intent.

In its *Fifth Report and Order*, the Commission concluded that, under Section 336, broadcasters should have flexibility in the use of the digital spectrum to provide ancillary or supplementary services desired by consumers, so long as they do not derogate the free, over-the-air digital program service required by the Commission.³⁷ The Commission concluded that providing such flexibility will promote innovation, spectrum efficiency, and a quick digital transition. For reasons described above, these benefits apply fully to public broadcasters' offer of ancillary or supplementary services on their excess digital spectrum. Moreover, providing public

³⁷ *Id.* ¶¶ 29-33.

television stations with flexibility in the provision of such services will allow them to maximize revenues that support their mission-related services, as described above.

Section 336 makes no distinction between commercial and noncommercial television stations. Nor does the legislative history of this provision suggest any basis for imposing special restrictions on the flexibility of public television stations to offer such services. Indeed, in view of the long history of prior efforts by Congress and the Commission to provide additional revenue opportunities for public broadcasters,³⁸ the most reasonable conclusion is that Congress intended that public television stations have substantial opportunity to use their digital spectrum to earn revenue from ancillary or supplementary services.

Public television stations should therefore have substantial flexibility to use their excess digital spectrum to provide ancillary or supplementary services, subject to the constraints described below.

B. Public Television Stations Must Be Used Primarily to Provide a Noncommercial Educational Service and May Offer Only Services That Do Not Interfere with Provision of Public Telecommunications Services.

While Section 336 does not impose special restrictions on public television stations, there are two limitations that should be applied to provision of ancillary or

³⁸ See pages 16-18 above. The Commission did not impose special restrictions on public television stations in connection with these remunerative activities in the analog environment. Indeed, in several of its decisions, the Commission stated explicitly that public television stations would have the same scope of authority as commercial stations to offer the services in question. See, e.g., *VBI Report and Order*, 101 F.C.C.2d at 981 (Commission "will allow public television stations to use the VBI for ancillary telecommunications services in the manner as commercial broadcasters").

supplementary services in the digital environment. First, a public television station must be used primarily to provide a noncommercial educational service. Second, the offering of ancillary or supplementary services must not interfere with the provision of public telecommunications services.

These standards are consistent with those the Commission has applied in the analog environment. The Commission has long required that public television stations be used primarily for noncommercial purposes. Under 47 CFR § 73.621(a), a nonprofit educational organization may obtain a license to operate a noncommercial educational television station only if the station "will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service."³⁹ And Section 399B, the provision under which Congress expressly authorized public television stations to offer services, facilities, and products in exchange for remuneration, provides that a public television station's offering of such services "shall not interfere with the provision of public telecommunications services by such station."⁴⁰ The Commission

³⁹ This requirement governs virtually all public television stations. It does not cover one municipality that is eligible for a noncommercial television license. See 47 CFR § 73.621(b).

⁴⁰ 47 U.S.C. § 399b(c). "Public telecommunications services" are defined as "noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronics communications." 47 U.S.C. § 397(14).

Section 399B also requires public television stations to account separately for amounts received, or costs related to, the offering of services, facilities, or products for remuneration. 47 U.S.C. § 399b(d). This provision would apply to any ancillary or (continued...)

should make clear that these limitations on public television stations' remunerative activities apply to services offered in the new digital environment.

These limitations provide public television stations with appropriate flexibility to use their excess digital spectrum to offer revenue-generating ancillary or supplementary services. In the analog environment, the Commission approved the offer by public broadcast stations of a variety of ancillary services, including teletext services, services using subcarrier frequencies of stations' aural basebands, data transmission and other services using the VBI of stations' video signals, and sharing of excess capacity on stations' auxiliary broadcast facilities.⁴¹ The Commission did not even suggest in its decisions that provision of these ancillary services would violate Section 73.621(a) of the Commission's rules. And in each case, the Commission explicitly concluded that the offering of these services would not interfere with the provision of public telecommunications services under Section 399B.⁴²

supplementary services a public television station offers using its excess digital spectrum.

⁴¹ See *Teletext Report and Order*, 48 Fed. Reg. 27054, at ¶¶ 50-52; *Subcarrier Frequencies Final Rule*, 49 Fed. Reg. 18100, at ¶ 16; *VBI Report and Order*, 101 F.C.C. 2d at 981; *Broadcast Auxiliary Facilities Report and Order*, 93 F.C.C. 2d at 578.

⁴² In one area, that of subscription television, the Commission declined to grant the same broad authority to public television stations as to commercial stations, citing Section 399B's prohibition on interference with public telecommunications services. *In the Matter of Amendment of Part 73.642(a) of the Commission's Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees*, Report and Order, BC Docket No. 82-441, 97 F.C.C.2d 411 (1984). While the Commission stated that it would consider requests by public television stations to offer subscription television services on a waiver basis, it cited concerns that a blanket (continued...)

The advantages of digital technology should permit even greater flexibility for public television stations to offer ancillary services under these standards. In a digital environment, there will be sufficient capacity for public television stations to offer a range of additional services while preserving their primary use for a noncommercial educational service.⁴³ Moreover, enough capacity will be available that there will be no danger of interference with a station's core mission-related services. Only excess digital capacity will be used for any ancillary or supplementary services.⁴⁴ In addition, the requirement of Section 336 that ancillary or supplementary services not derogate services required by the Commission provides separate assurance that any ancillary or

authorization for such services might lead to a change in the nature of public television stations. *Id.* at 413.

The concerns that troubled the Commission in 1984 are not relevant in a digital context. With analog technology, a subscription television service could have displaced a large part, or even all, of the free broadcast service. In contrast, digital technology permits multiple program services to be provided in a single channel. Thus, a public television station could offer a subscription television service without in any way displacing the station's basic free, over-the-air broadcast service.

⁴³ According to a survey recently conducted by APTS, the majority of public television licensees currently intend to use more than 75 percent of their digital capacity to provide mission-related services. Nearly 30 percent of licensees do not intend to use any of their digital capacity for non-mission-related services. The response rate for the APTS survey was over 70 percent.

⁴⁴ In explaining Section 399B's prohibition on interference with public telecommunications services, the House committee stated that it intended "that excess, as opposed to basic, capacity of available facilities – 'dead time' in the studios and on the satellite for example – may be used for these expanded activities." H.R. Rep. No. 97-82, at 16.

supplementary service will not interfere with a public television station's basic broadcast service.

Section 399B also prohibits a public television station from "mak[ing] its facilities available to any person for the broadcasting of any advertisement."⁴⁵ As indicated in its filings in MM Docket No. 87-268, APTS believes that this restriction does not apply to ancillary or supplementary services. In its *Notice* in this proceeding, the Commission tentatively concludes that public television stations may air advertisements on all "non-broadcast" service, including subscription video services, but that the advertising ban should apply to any "broadcast" services. APTS agrees that advertiser-supported non-broadcast services (including subscription television) are permissible under the clear language of Section 399B. However, APTS also believes that, in the digital context, Section 399B reaches only the basic broadcast service of a public television station, not any ancillary or supplementary service (whether broadcast or non-broadcast in nature).

In the analog context, a station ordinarily carries only a single broadcast service. It is that single basic broadcast service that Congress presumably sought to insulate from advertising and the pressures to maximize audience size that accompany it. In enacting the 1981 legislation, Congress was concerned with insulating public television "program control and content from the influence of special interests."⁴⁶ Unlike with the basic broadcast service, this concern is not present with ancillary services, *e.g.*,

⁴⁵ 47 U.S.C. § 399b(b)(2).

⁴⁶ H.R. Rep. No. 97-82, at 16.

where a public television station leases excess digital spectrum to an entity that elects to use that capacity to provide an advertiser-supported service.⁴⁷ In that situation, there is no need to insulate the station from commercial pressures that might influence programming decisions.

Public television's experience with advertiser-supported services using excess VBI capacity demonstrates that ancillary services can co-exist with public television's mission-related services without exerting commercial pressures on the latter.⁴⁸ Based on this experience, the Commission could properly find that it is in the public interest to permit a public television station to offer an advertiser-supported ancillary or supplementary service (including a broadcast service).

In any event, this issue is hypothetical; it is unclear whether and to what extent public television stations will in fact provide any ancillary or supplementary services that would involve advertiser-supported broadcasting. The better course at this

⁴⁷ In its prior decisions authorizing public television stations to offer ancillary services in the analog environment, the Commission did not even suggest that such services would be subject to the advertising ban of Section 399B. Rather, it stated broadly that public television stations may offer the services in question to the same extent as commercial stations. In at least one of these decisions, involving teletext services, the Commission expressly described advertiser-supported service as one model for what stations might elect to offer. *Teletext Report and Order*, 48 Fed. Reg. 27054, at ¶48 (some stations may "focus on an advertiser-supported consumer-oriented service"); *id.* at ¶50 (public television stations "are permitted the same discretion with respect to services . . . as commercial stations").

⁴⁸ Instructional Television Fixed Service ("ITFS") provides another example of the coexistence of advertiser-supported commercial services and noncommercial services. Under the Commission's regulations, ITFS licensees may lease excess channel capacity, so long as the licensee preserves a specified number of hours per week for ITFS purposes. See 47 CFR § 74.931(e).

point would be to allow public television stations flexibility to develop and implement ancillary or supplementary uses of the digital spectrum. Should any uses raise concerns under Section 399B, the Commission could then address these concerns in a concrete context. This approach would avoid premature promulgation of rules that may turn out to be overbroad and unnecessary.

C. There Is No Need for the Commission to Promulgate Special Regulations Governing Ancillary or Supplementary Services Offered by Public Television Stations.

Very few changes to the Commission's regulations are needed in connection with the provision of ancillary or supplementary services by public television stations.⁴⁹ The regulations the Commission promulgated in its *Fifth Report and Order* are sufficient to govern provision of ancillary or supplementary services by both commercial and noncommercial stations.

With respect to Section 73.621 of the Commission's regulations, the Commission need only clarify that the rule is applicable, without change, to the digital channel. The rule's requirement that a public television station be used primarily to provide an educational and nonprofit, noncommercial service appears to leave room for stations to provide some ancillary or supplementary services on their excess digital spectrum, just as it permitted provision of ancillary services by stations in the analog

⁴⁹ The one exception is Sections 73.642 and 73.644 of the Commission's regulations, which should be modified to provide that public television stations may provide subscription television services. At present, these rules provide that only commercial and low power television stations are authorized to provide subscription television services. As explained at note 43 above, in the digital environment there is no reason why public television stations should be barred from offering subscription television services.

environment. In order to eliminate any doubts, however, it would be advisable for the Commission to state expressly in its order that public television stations may offer ancillary or supplementary services on their excess digital capacity so long as the station is used primarily to offer a noncommercial educational service.⁵⁰

There is no reason to promulgate any new regulations that would restrict the ability of public television stations to offer ancillary or supplementary services. While one group of commenters has expressed concern that a public television station could offer ancillary or supplementary services that would change the essential character of the station, they cite no basis for believing that this will occur.⁵¹ In fact, the concern is simply not credible. There is no reason to think that public television stations will become havens for home shopping or infomercial services in the digital environment.

As noted above, there will be important limitations on the extent to which public television stations can even consider commercial ventures, including the long-standing Commission requirement that public television stations be used "primarily" to provide a noncommercial educational service and the statutory requirement that a public television station's remunerative activities not interfere with the provision of public

⁵⁰ The *Notice* at ¶32 asks whether the Commission should state that a public television licensee's obligation to provide a primarily educational service applies to its entire digital bitstream. APTS has no objection to such a formulation, although the more general statement suggested in the text above appears sufficient.

⁵¹ See the Opposition of Media Access Project et al. to Petitions for Reconsideration, MM Docket No. 87-268 (filed July 10, 1997), at 8-9.

telecommunications services. These restrictions impose significant limitations on the overall mix of activities engaged in by public television stations.

Moreover, there are other restrictions that will limit the extent to which public television stations will be able to offer ancillary or supplementary services. In particular, the remunerative activities of public television stations are limited by their status as nonprofit, tax exempt entities.⁵² As tax exempt entities, stations must comply with strict conditions and methods of operation. The most significant requirement is that any tax exempt business must be organized and operated “exclusively” for an exempt purpose.⁵³ This means that a tax exempt business must engage *primarily* in activities that further the exempt purpose of the organization.⁵⁴ If a public television licensee engages in remunerative activities that are unrelated to the exempt purpose of the

⁵² The Communications Act requires that a public television station be owned and operated by a governmental entity or a nonprofit entity. See 47 U.S.C. § 397(b); 47 C.F.R. § 73.621(a). As a practical matter, all public television licensees are tax-exempt under the Internal Revenue Code. See *Amendment of the Commission's Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees*, Notice of Proposed Rulemaking (“*Subscription Television NPRM*”), 47 Fed. Reg. 36252, 36255 (1982) (“The Commission presently requires that a public broadcaster must be a nonprofit (tax exempt) institution under the Internal Revenue Code to qualify for a license on a reserved channel.”).

⁵³ See Section 501(c)(3) of the Internal Revenue Code, as amended. Exempt purposes include the charitable, educational and literary functions undertaken by public broadcast licensees. See Treas. Reg. § 1.501(c)(3)(d)(1)(i).

⁵⁴ See Treas. Reg. § 1.501(c)(3)(c)(1) (“An organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in 501(c)(3).”).

organization, the income generated from such activities will be taxed.⁵⁵ In addition, if the Internal Revenue Service were to determine that a public television licensee's unrelated, remunerative services have become disproportionately large in relation to the licensee's primary activities, the public television station could lose its tax exempt status altogether.⁵⁶ As the Commission has emphasized, if a public television licensee loses its tax exempt status, it can lose its public broadcasting license as well.⁵⁷

The tax implications of engaging in unrelated, revenue-generating activities will restrict public broadcasters' decisions to offer remunerative ancillary or supplementary services and will ensure that stations focus primarily on their mission-related services. Public television licensees cannot afford to be heavily taxed on their activities, and they certainly cannot afford to lose their public broadcasting licenses.

In addition, all public television stations are subject to oversight by a responsible body. Any station that is owned and operated by a government agency is subject to oversight by a state legislature or other political body. Under 47 U.S.C. § 396(k)(8), any other public television station must establish a community advisory board with a membership that is "reasonably representative of the diverse needs and

⁵⁵ See Section 513 of the Internal Revenue Code, as amended; *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 F.C.C.2d 895, 897 (1982) ("It should be noted that 26 U.S.C. § 513 requires public broadcast stations to report and pay taxes on unrelated business income.").

⁵⁶ See Treas. Reg. § 1.501(c)(3)(c)(1) ("An organization will not be [regarded as operating exclusively for one or more exempt purposes] if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.").

⁵⁷ See *Subscription Television NPRM*, 47 Fed. Reg. at 36255.

interests of the communities served by such stations." The advisory board reviews, among other things, the service provided by the station and the significant policy decisions of the station.⁵⁸ These oversight mechanisms help to ensure that public television stations will focus primarily on services that relate to their educational and public service mission, not on commercial endeavors.

In view of these existing limitations on the activities of public television stations, there is certainly no need to impose further restrictions. To the extent there may be concerns that permitting them to offer ancillary or supplementary services will cause public television stations to become too "commercial," the concerns are misplaced. The restraints on the activities of public television stations described above will protect against such a result.

Even if the Commission had genuine concerns on this subject, it would be premature to attempt to impose restrictions now. At this point, any such concerns are hypothetical. The Commission will have ample opportunity to regulate in the future if it appears, contrary to APTS's expectation, that problems are developing.

In its *Fifth Report and Order*, the Commission stated that it planned to reexamine its digital regulations every two years to determine whether changes are needed.⁵⁹ This provides a regular opportunity for the Commission to consider the manner in which public television stations are choosing to offer ancillary or

⁵⁸ 47 U.S.C. § 396(k)(8).

⁵⁹ *Fifth Report and Order* ¶ 116. The Commission further noted that it would review its flexible approach to permitted ancillary and supplementary services during these periodic reviews and would make adjustments to its rules as needed. *Id.* ¶ 34.

supplementary services. If it appears that, as a result of offering such services, public television stations are no longer being used "primarily" for noncommercial services, or are otherwise acting in a manner inconsistent with the public interest, the Commission can then address these problems in a concrete context. In the meantime, public television stations should have flexibility in connection with such services.

V. PUBLIC TELEVISION LICENSEES SHOULD BE EXEMPT FROM ANY OBLIGATION TO PAY FEES IN CONNECTION WITH OFFERING ANCILLARY OR SUPPLEMENTARY SERVICES.

In MM Docket No. 97-247, APTS and PBS submitted comments explaining that public television licensees should be granted an exemption from any obligation to pay fees on revenues received in connection with ancillary or supplementary services offered on a station's excess digital spectrum when such revenues are used to support the station's mission-related activities. The comments explained that creation of an exemption would be consistent with both the terms of Section 336 and other congressional and regulatory policies.

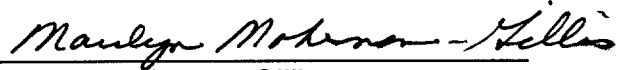
Rather than repeating these arguments here, APTS hereby incorporates by reference its previously filed comments. Copies of both the opening comments and reply comments of APTS and PBS in MM Docket No. 97-247. are included as Attachment 4 hereto.

VI. CONCLUSION

For the reasons stated above, the Commission should authorize public television stations to offer ancillary or supplementary services on their excess digital spectrum and should provide these stations with flexibility in connection with such services, so long as the stations are used primarily to provide a noncommercial

educational service. For the reasons stated in the APTS/PBS comments in MM Docket No. 97-247, the Commission should exempt public television licensees from payment of fees in connection with offering ancillary or supplementary services.

Respectfully submitted,



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